UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

LOS ANGELES TIMES
COMMUNICATIONS LLC

Employer

and Case 21-RC-20939

GRAPHIC COMMUNICATIONS
CONFERENCE/INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

This report contains my recommendations regarding the Employer's objections to the election in the above matter. Following a hearing where all parties presented witnesses and evidence, I conclude that all of the Employer's objections to the election should be overruled. I also conclude that the Petitioner should be certified as the collective-bargaining representative of the unit employees.

Procedural Background

The petition in this matter was filed on December 4, 2006.[1] Pursuant to a Stipulated Election Agreement, an election by secret ballot was conducted on January 4 and 5, 2007, in the unit agreed appropriate for collective-bargaining.[2]

[1] All dates herein are 2006 unless otherwise noted.
[2] The appropriate unit in Case 21-RC-20939 is all full-time and regular part-time presspersons, color specialists, ink mixers, pressroom operators, presspersons, apprentice presspersons, press maintenance specialists, roller specialists, reel room coordinators, pressroom utility persons and operations trainers employed by the Employer at its facilities located at 2000 East Eight Street, Los Angeles, California; and 1375 Sunflower Street, Costa Mesa, California; excluding all other employees, professional employees, guards and supervisors as defined in the Act.

The tally of ballots served on the parties at the ballot count conducted on Saturday, January 6, 2007, showed that of approximately 288 eligible voters, 140 cast ballots for, and 131 against, the Petitioner. There were zero void ballots and four challenged ballots, which were insufficient in number to affect the results of the election. On January 16, 2007, the Employer timely filed objections to conduct affecting the results of the election. An investigation of the objections was conducted and, on January 26, 2007, the Regional Director issued and served upon the parties her Report on Objections and Order Directing Hearing and Notice of Hearing, in which she concluded the issues raised by Objections Nos. 1, 2, 3, and 5, could best be resolved after a hearing.[3] Pursuant thereto, a hearing on the Petitioner's Objections Nos. 1, 2, 3, and 5 was held in Los Angeles, California, on February 15 and 16, 2007. All parties were given a full opportunity to be heard, to examine and cross-examine witnesses, and to present evidence pertinent to the issues.

Upon the entire record of the hearing and my observation of the witnesses, their demeanor and testimony, I make the following findings of fact, conclusions, and recommendations:

Preface

The recitation of facts in this report is, unless otherwise noted, based on a composite of the credited aspects of the testimony of all witnesses, unrefuted testimony, supporting documents, undisputed evidence, and careful consideration of the entire record including each party's oral argument on the record.

[3] On January 25, 2007, the Employer, with the Regional Director's approval, withdrew Objection No. 4.

Although each iota of evidence, or every argument of counsel, is not individually discussed, all matters have been considered. Omitted matter is considered either irrelevant or superfluous. To the extent that testimony or other evidence not mentioned might appear to contradict the findings of fact, that evidence has not been overlooked. Instead, it has been rejected as incredible or of little probative value. Unless otherwise indicated, credibility resolutions have been based on my observations of the testimony and demeanor of witnesses at the hearing. 3-E Company v. NLRB, 26 F.3d 1, 3, 146 LRRM 2574, 2575 (1st Cir. 1994); NLRB v. Brooks Camera, Inc., 691 F.2d 912, 915, 111 LRRM 2881, 2883 (9th Cir. 1982); NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 49, 76 LRRM 2224, 2226 (9th Cir. 1970). Failure to detail all conflicts in testimony does not mean that such conflicting testimony was not considered. Bishop and Malco, Inc. d/b/a Walkers, 159 NLRB 1159, 1161 (1966).

The Objections

Objection No. 1

> During scheduled voting time and in the polling area, a Union Observer engaged in objectionable conduct by campaigning on behalf of the Union, contrary to Board rules and regulations, and contrary to the explicit instructions of the Board Agent conducting the election. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to make a free and reasoned choice in the election.

Objection No. 2

> During scheduled voting time, a Union Observer engaged in objectionable conduct by communicating with eligible voters while he was assigned by the Board Agent to walk through the workplace with a sign that informed voters that the polls were open and that they were free to vote, and by continuing to communicate with eligible voters in the immediate vicinity of the polling place at a time after he was supposed to return to the polling place to perform his responsibilities as an Observer. Such conduct violated the explicit instructions of the Board Agent who was conducting the election, it conveyed the impression that the Union Observers were not subject to the rules that otherwise applied to the Employer Observers and it created the impression that, during the voting, the Union Observer was giving to Union supporters information about the employees who voted and the events occurring in the polling area that the Union Observer had no right to convey, thereby interfering with, coercing, and restraining employees in the exercise of their Section 7 rights, and interfering with their ability to make a free and reasoned choice in the election.

Objections Nos. 1 and 2 will be considered together, inasmuch as they involve like or related conduct.

Objections Nos. 1 and 2 involve conduct that occurred only at the Employer's Olympic Boulevard facility.[4] That location, which is commonly referred to as the "Oly plant", is a manufacturing facility that measures approximately 750,000 square feet.

The election at the Oly plant was held in the roller room, located on the second floor, at the northwest corner. The polling sessions for the election were 9:00 a.m. to 11:00 a.m., 2:00 p.m. to 4:00 p.m., and 8:30 p.m. to 10:30 p.m. Employees were released to vote according to a Voting Release Schedule. During the election, one Employer observer and one Petitioner observer walked the plant floor, announcing that it was time to vote, pursuant to that Schedule.

[4] The Employer's other manufacturing facility is located in Costa Mesa, and is commonly referred to as the "Orange County plant."

With regard to Objection No. 1, employee Jesse Espinoza (herein "Espinoza") testified that he served as an Employer observer at the Oly plant, during the swing shift (2:00 p.m. to 4:00 p.m.), on both days of the election. Espinoza testified that prior to the election, the Board agent provided instructions to the observers regarding what they were, and were not, permitted to do during the election. Espinoza recalled that the Board agent told them the following; do not wear campaign "paraphernalia," stay with partners at all times;[5] do not say anything that might influence employees' votes; limit conversations with employees when releasing them to vote; and no campaigning.[6]

According to Espinoza, on the second day of the election (January 5, 2007), employee Dennis Rios (herein "Rios") also served as an Employer observer and employees Dan Berumen (herein "Berumen") and Ronald Pineda (herein "Pineda") served as observers for the Petitioner. During that polling session, Espinoza recalled that at some point, Pineda started "drawing parallels between what we now have and what we used to have, pointing out crew size difference, benefits difference, workload" [7] [Tr. pg. #150, ln. #4-6].[8] At the time Pineda made these statements, the only individuals present were the Board agent, Espinoza, Pineda, and Berumen. There were no voters in the room at the time. According to Espinoza, Pineda discussed those "parallels" for about 30 to 60 seconds before the Board agent

[5] Espinoza was paired with Ronald Pineda, and Berumen with Rios, for the purpose of walking the plant floor to release employees to vote.
[6] The record does not reflect exactly when the Board agent gave Espinoza these instructions or if they were given before each polling session that Espinoza served as an observer.
[7] That was the extent of what Espinoza recalled Pineda stating at the time. Also, Espinoza testified that he was not "really" paying attention to what Pineda was saying since he was reading a newspaper at the time.
[8] Throughout the remainder of this Report, all citations to the transcript will be referred to as "Tr." followed by the appropriate page and line number.

instructed Pineda to change the subject. According to Espinoza, Pineda immediately complied with the Board agent's instructions and there is no evidence that Pineda discussed such matters for the remainder of the election. According to Espinoza, Rios and he had already voted by the time Pineda made the above-statements.

Although Pineda testified during the hearing, neither party took the opportunity to question Pineda about his alleged campaigning during the course of the election.

According to Employer Rios, the Board agent instructed the observers not to communicate with voters beyond saying hello. Rios testified that during the election, he witnessed Berumen wink at a few employees that came in to vote.[9] Rios could not recall the names of those employees but could tell that they were "strong Union supporters" [Tr. pg. #220 ln. #12].[10] Rios also testified that there were other employees "checking in" at the time that he observed Berumen winking at the employees. Rios testified that he got the impression that Berumen was winking at certain employees because the Union possibly won the election.

Petitioner observer Berumen denies that he winked at any employees during the election.

With regard to Objections No. 2, Rios testified that on January 5, 2007, as he and Berumen were returning from their last trip to release employees to vote, he observed employee Berry Tillage (herein "Tillage") walking towards the roller room. Rios states that he went inside the roller room but that Berumen stayed outside of the room. Rios testified that about one minute after he returned, the Board agent asked

[9] It is not clear exactly when Rios observed Berumen wink at employees.
[10] Rios was unable to provide evidence to support why he thought the employees supported the Union.

him where Berumen was and Rios stated that Berumen was outside talking to Tillage. The Board agent instructed Rios to get Berumen. Rios testified that he walked over to the door, stuck his head out, and told Berumen that the Board agent wanted him to return inside. Rios testified that he never heard what Tillage and Berumen said to each other and that he only heard their voices engaged in some sort of exchange. According to Rios, after he told Berumen to return inside, Tillage did not enter the room and vote. To Rios's knowledge, Tillage had already voted since "basically everyone voted before that" [Tr. pg. # 228, ln. # 6-7], including himself and the other observers. Rios also testified that no employees came into the room during Tillage's and Berumen's exchange and that he did not observe any employees in the area outside of the roller room when he told Berumen to return inside the room.

Employer observer Espinoza confirmed that Rios returned to the room by himself. Espinoza testified that about 20 to 30 seconds later, he asked Rios where Petitioner observer Berumen was, and that Rios stated that Berumen was standing outside of the roller room. Espinoza testified that the Board agent said that was probably okay. Rios then added that Berumen was talking to Tillage, at which time the Board agent instructed Rios to get Berumem. Espinoza testified that he did not know whether Tillage and Berumen were engaged in a conversation while outside of the roller room.

Petitioner observer Berumen admitted that he talked to Tillage, outside of the roller room, during the election, but that he did so on January 4, 2007. Berumen testified that Tillage approached him just outside of the roller room and said, "Is this the place?" and that he responded, "This is the place" [Tr. pg. #257 ln. # 4-5].

Thereafter, Berumen returned inside the room and Tillage walked by. Berumen testified that he did not recall Rios coming out to get him on either January 4 or 5, and that he had no knowledge of the Board agent instructing Rios to bring him inside.

Tillage confirmed that he spoke to Berumen, outside of the roller room, on January 4, 2007. Tillage testified that he observed Berumen standing outside of that room, near the door. According to Tillage, he did not engage in a conversation with Berumen and only asked Berumen if that was the place to vote, and that Berumen replied that it was the place to vote. Tillage testified that the exchange lasted no more than 5 to 10 seconds. Tillage also testified that at the time, he observed Employer observer Rios between the door to the roller room and Berumen. According to Tillage, after he asked Berumen that question, he went into the room and voted.

Analysis and Recommendation of Objections Nos. 1 and 2

In Boston Insulated Wire & Cable Co., 259 NLRB 1118 (1982) the Board state that it is its province and duty to safeguard its electoral processes from conduct which inhibits the free exercise of employee choice. In carrying out this duty, "the Board is extremely zealous in preventing conduct which intrudes upon the actual conduct of its elections." Claussen Baking Company, 134 NLRB 111 (1961). Thus, the Board prohibits electioneering "at or near the polls."[11] And, as means of enforcing this ban against electioneering, the Board will set aside an election on the basis of any prolonged conversations between a representative of a party to the election and employees waiting in line to vote, without inquiring into the nature of the conversation itself. Milchem Inc., 170 NLRB 362 (1968). Such prohibitions, of course, are not required by the Act. Rather, they have been devised by the Board

[11] Claussen Baking Company, supra.

under its authority to regulate its own election procedures and serve to eliminate the unfair advantage gained by last minute electioneering and pressure as well as to minimize the distraction and interference which result therefrom. As the Board stated in Milchem Inc., "[t]he final minutes before an employee casts his vote should be his own, as free from interference as possible."

Nevertheless, the Board does not apply its "no electioneering" rules to set aside elections whenever electioneering takes place "at or near the polls," regardless of the circumstances. While the Board seeks to establish election conditions as ideal as possible, "elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards."[12] A representation election is often the climax of an emotional, hard-fought campaign and it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering in the vicinity of the polls.[13]

When faced with evidence of impermissible electioneering, the Board determines whether the conduct, under the circumstances, "is sufficient to warrant an inference that it interfered with the free choice of the voters."[14] This determination involves a number of factors. The Board considers not only whether the conduct occurred within or near the polling place, but also the extent and nature of the alleged

[12] The Liberal Market Inc., 108 NLRB 1481, 1482 (1954). While Liberal Market Inc. involved the effect of antecedent conduct upon a Board election, the standard is equally applicable to allegations of improper electioneering.

[13] Courts have recognized that that the Board has "broad discretion in creating and enforcing standards to ensure fair election." Hall-Brooke Hospital v. N.L.R.B., 645 F.2d 158 (2d Cir. 1981). See also N.L.R.B. v. Vista Hill Foundation, 639 F.2d 479 (9th Cir. 1980); N.L.R.B. v. Campbell Products Department, 623 F.2d 876 (3d Cir. 1980).

[14] Star Expansion Enterprises, 170 NLRB 364, 365 (1968). Of course, conduct which violates the strict Milchem rule is found to constitute per se interference with the free choice of the voters.

electioneering,[15] and whether it is conducted by a party to the election or by employees.[16] The Board has also relied on whether the electioneering is conducted within a designated "no electioneering" area[17] or contrary to the instructions of the Board agent.

Analyzing Petitioner observer Pineda's conduct in this case under the test set forth in Boston Insulated Wire, supra, it is clear that Pineda made certain statements within the polling place and that he was serving as a party to the election at the time. However, Espinoza's recollection of Pineda's statements was quite vague. As discussed, Espinoza recalled only that Pineda drew parallels between what employees had and what they could have with the Union. Also, there is no evidence that Pineda's statements were directed at employees waiting in line to vote because Espinoza conceded that there were no voters in the room at the time. Moreover, Espinoza testified that at the time Pineda made the statements, all of the observers had already voted. Finally, Espinoza testified that Pineda drew parallels for about 30 to 60 seconds before the Board agent told Pineda to change the subject, and that Pineda complied with those instructions. Based on the foregoing, I find the evidence of Pineda's statements presented by the Employer insufficient to warrant an inference that it interfered with the exercise of the employees' free choice.

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[15] Cabs Housekeeper Service, Inc., 241 NLRB 1259 (1979). See also Harold W. Moore d/b/a Harold W. Moore & Son, 173 NLRB 1258 (1968). Even the Board's strict Milchem rule does not apply to any "chance, isolated, innocuous comment or inquiry" between a party to the election and a voter.

[16] In regulating the conduct of elections, the Board has long distinguished between the conduct of parties to the election and the conduct of employees. See, generally, Orleans Manufacturing Co., 120 NLRB 630 (1958). Thus, the Milchem rule applies only to prolonged conversations between parties to the election and voters. See N.L.R.B, v. Campbell Products Department, supra and N.L.R.B, v. Slagle Manufacturing Company, slip op. #80-1088 (10th Cir. 1981). This distinction has been applied to other types of electioneering as well. Niagra Wires, Inc., 237 NLRB 1347 (1978). Third-party conduct must be "so disruptive" as to require setting aside the election. Robert's Tours, Inc., 244 NLRB 818 (1979).

[17] Marvil International Security Service, 173 NLRB 1260 (1968); Cabs Housekeeper Service, Inc., supra.

In U-Haul Co. of Nevada, Inc., 341 NLRB 195 (2004), the Board adopted the hearing officer's recommendation to overrule the employer's objection regarding a union observer engaging in electioneering by giving certain employees "thumbs-up" signs and smiles. In that case, the Board concluded that the union observer's conduct was "not clearly linked to any instructions to vote for the Union." The Board further concluded that the gestures were "unaccompanied by any verbal exchange and could not reasonably be understood to convey any particular meaning."

In this case, Rios testified that he observed Petitioner observer Berumen wink at certain employees as they came into vote, and that other employees, who were getting checked-in to vote, witnessed that winking. However, there is no evidence that Berumen accompanied his winking with instructions to vote for the Union.[18] As noted, Berumen flatly denied that he winked at any employees. However, it is unnecessary to make a credibility determination in this matter because, based on U-Haul, supra, even if I credited Rios' testimony, winking, on its own, could not be understood to convey any particular meaning and thereby does not fall into the realm of objectionable conduct.

With regard to Objection No. 2, it is undisputed that employee Tillage and Petitioner observer Berumen engaged in some sort of exchange outside of the polling place during the election. Berumen and Tillage provided corroborating testimonies that the exchange consisted of Tillage asking Berumen if that was the place to vote and Berumen answering in the affirmative. Employer observers Rios and Espinoza, who were also presented to testify in the matter, both conceded that they did not hear any part of the exchange. Also, Rios recalled Berumen only being outside of the

[18] I am of the view that winking is a gesture that is comparable to a "thumbs-up" or a smile.

room, with Tillage, for about one minute, while Espinoza recalled Berumen being out there for 20 to 30 seconds.

There is some dispute regarding how Berumen returned to the room and what Tillage did thereafter. Rios and Espinoza testified that the Board agent instructed Rios to bring Berumen back into the room, and that Tillage never came in the room to vote.[19] Berumen testified that he returned to the room on his own, and confirmed that Tillage did not enter the room to vote. Tillage testified that Rios was nearby when the exchange between Berumen and he took place, and that after the exchange, he went inside the room and voted.

It is clear that the record revealed some dispute regarding what occurred just after Berumen's and Tillage's exchange. However, that is not the issue to be considered in this matter and instead, the exchange itself must be analyzed. Based on corroborating testimonies, Berumen stayed outside of the room because Tillage asked him if that was the place to vote. Berumen said yes and that was the extent of the conversation. The Employer was unable to provide any evidence that contradicted those testimonies. Also, although the testimonies regarding the length of the exchange varied, it appears that it lasted no more than one minute. Moreover, at the time that the exchange took place, there were no voters in, or around, the room, and all of the observers had already voted. Based on the foregoing, there is insufficient evidence that the brief exchange could have interfered, in any way, with the exercise of the employees' free choice.

[19] As noted, there were no employees in or outside of the room at the time that this exchange took place.

In light of the above, I recommend that Employer's Objection Nos. 1 and 2 be overruled in their entirety.

During the course of the hearing, the Employer raised a new issue, arguing that it fell within the parameters of Objections Nos. 1 and 2. I permitted the Employer to make an offer of proof on the record but refused to accept evidence on this matter. In its offer of proof, the Employer stated that it was prepared to present Employer observer Bill Delgado to testify that on one of the elections dates, at the Oly Plant, Union Representative Marty Keegan (herein "Keegan") allegedly raised an issue with regard to some company literature that employees would have to pass by on their way to the polling site. In its offer, the Employer stated that in response, the Board agent and the Employer representatives left the polling site. The Employer asserted that during their absence, Keegan asked the Employer observers some general questions about their positions and then told them that the Union was not a bad thing, that everything that they heard from the company was not true, and that they should give the Union a chance.

The Employer stated that it did not learn about the incident until February 9, 2007, but conceded that it could have discovered this information earlier since it had access to Employer observer Delgado after the election.

It is my view that the incident described in the Employer's offer does not fall within Objections Nos. 1 and 2, given the specific nature of those objections, or within the scope of any other objections set for hearing. Moreover, the Employer admits that the newly-provided information was previously available. Based on the

foregoing, I recommend that this matter not be considered. I adhere to my view that the evidence not be permitted.

Objection No. 3

> On or about December 27, 2006, two self-identified Union supporters and agents threatened a bargaining unit employee who was wearing a hat that contained the words, "Vote No." Among other things, one or both of these Union supporters, on behalf of the Union, said that the bargaining unit employee was "sending mixed messages" by wearing the hat, and said that "In L.A., sending mixed messages can be dangerous." These statements made the employee think of reports he had heard that in previous campaigns by the Union and its predecessors, the cars of bargaining unit employees who supported the "Vote No" option at the Employer's Olympic (or "LA") pressroom had been vandalized. The bargaining unit employee therefore understood the statements to constitute threats that his new vehicle would be vandalized if he continued to wear the "Vote No" hat, or if he otherwise sent "mixed messages" that he supported the "Vote No" option in the election. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to exercise a free and reasoned choice in the election.

This objection involves statements that employee Pineda allegedly made to another employee. The Employer contends that when Pineda made the unlawful statements, he was acting as an agent of the Union. It is undisputed that Pineda distributed union authorization cards to employees; distributed Union hats at the Oly plant; wore a t-shirt that had "Organizer" written on the sleeve; communicated with Keegan about the progress of the organizing campaign at the Oly plant; answered employees' questions about the Union;[20] and maintained a website pertaining to the Union organizing campaign. Also, Pineda admitted that employees may have viewed him as the primary connection to the Union and that he held himself out to the employees as serving in that capacity. However, it is also undisputed that Keegan

[20] Keegan also contacted employees directly and answered their questions.

was in charge of the organizing campaign at the Employer's facilities;[21] Pineda was not paid by the Union; the Union did not give Pineda the authority to speak on its behalf; and when Pineda was unable to answer employees' questions about the Union, he provided them with Keegan's phone number and/or suggested that they contact Keegan or Union Representative George Perez.

The incident described in this objection took place at the Employer's Orange County plant. Employee Steve Carr (herein "Carr") testified that on about December 27, at about 8:30 p.m. or 9:00 p.m., he went into the pressroom office to check the jobs. Carr testified that he heard someone come in behind him and say, "oh, nice hat" [Tr. pg. # 30 ln. # 25].[22] When Carr turned around he discovered that it was employee Jack Strickler (herein "Strickler"). Carr thanked Strickler and Strickler said that he guessed he knew where Carr stood. Carr said that he (Carr) was the only one who knew where he stood, and how he was going to vote. Strickler said yeah right and Carr left the office.[23]

Carr testified that after he left the office, he walked down K press and ran into Petitioner observer Pineda. Pineda greeted Carr and asked Carr what was wrong (Carr testified that Pineda must have sensed that he was upset). Carr told Pineda that he just had a confrontation with Strickler and Pineda asked what happened. Carr stated that Strickler was upset about the hat that he was wearing. Carr testified that Pineda proceeded to tell him that he was "sending mixed messages by talking to

[21] Keegan was in charge of all campaign activities and literature and materials distributed throughout. Also, throughout the campaign, Keegan conducted about 50 meetings during which he spoke to almost 200 employees.
[22] Carr testified that he was wearing a "Vote No" hat at the time.
[23] Carr testified that he did not feel threatened by Strickler's comments but rather insulted.

them[24] and wearing…a company hat" [Tr. pg# 34 ln. # 21-23]. Carr also testified that he thought he heard Pineda also state that sending mixed messages at the Oly plant could be dangerous. According to Carr, Pineda's statements reminded him about some rumors, regarding car tires being slashed, that had circulated at the Orange County plant, during the previous Union campaign.[25] Carr testified that he recently bought a new car, and that based on Pineda's comments, he had concerns that his car was in jeopardy.

Carr testified that after the conversation with Pineda, he reported the incident to Supervisor Gary DeVine and night foreman Billy Yarbrough.[26] Carr admitted that he only disclosed the specific statements that were made to him and not who made them.[27] Carr testified that reported the incident in case anything happened to his new car.

Carr testified that although Pineda's and Strickler's statements discouraged him from wearing "Vote No" paraphernalia, they did not influence how he voted during the election.

Pineda confirmed he saw Carr shortly after his conversation with Strickler and that Carr was upset about Strickler's comments about his "Vote No" hat. However, Pineda testified that he told Carr that he was not concerned about the hat

[24] It is unclear who "them" is but Pineda was most likely referring to the Union.
[25] Carr testified that they were only rumors and that the rumors were never confirmed to be true.
[26] Carr testified that he did not disseminate Strickler's and Pineda's statements to any other employees.
[27] DeVine confirmed that Carr reported the incident and not the names of the employees involved. The Employer also produced DeVine's notes from his meeting with Carr. These notes state the following: "Steve Carr. 12/27/06. Nice hat. Sending mixed messages. Sending out mixed messages in LA. Sending out mixed messages could be dangerous."

based on prior conversations that they had,[28] not to worry about the hat, and that it was not a problem. Pineda testified that he never told Carr that sending mixed messages could be dangerous.

Analysis and Recommendation of Objection No. 3

In deciding agency status, the Board is guided by common law principles. Under these principles, an agent's authority may be actual or apparent. Actual authority to act on the principal's behalf is that which is either expressly or impliedly created by the principal's manifestation to the agent, while apparent authority is that which is created as a result of the principal's manifestation to a third party that another is its agent. Electrical Workers Local 98 (MCF Services), 342 NLRB 740 (2004). The burden of establishing agency status is on the party asserting such a relationship. Corner Furniture Discount Center, Inc., 339 NLRB 1122 (2003).

Contrary to the Employer's contention, the undisputed evidence that Pineda engaged in activities such as distributing union authorization cards; distributing Union hats; wearing a Union t-shirt; communicating with the Union about the progress of the organizing campaign; and answering employees' questions about the Union does not establish that he was a general agent of the Union. United Builders Supply Co., 287 NLRB 1364, 1365 (1988) (holding that enthusiastic employee activist, who solicited and obtained signatures on authorization cards, organized and informed employees of union meetings, and served as election observer for union, was not general agent of union under the principles of actual or apparent authority where, inter alia, the union had its own admitted agent involved in the campaign). Such conduct merely reflected

[28] Pineda testified that during prior conversations with Carr, Carr expressed why he thought they needed the Union and agreed to support the Union.

Pineda's status as a leading union supporter during the election campaign.[29] Moreover, even if Pineda was the Union's most active and vocal supporter at the Employer's facilities, he was not the Union's only conduit to the employees. As noted, Keegan was in charge of all aspects of the Union's organizing campaign making it clear to the employees that the Union had its own spokesman separate and apart from active and enthusiastic union adherents such as Pineda. Corner Furniture Discount Center, Inc., supra. With regard to Pineda maintaining a website and holding himself out to employees as the primary connection to the Union, it is my view that such activities, on their own, do not make Pineda an agent of the Union. Accordingly, it is my view that there is insufficient evidence to establish that Pineda was an agent of the Union.

In evaluating whether alleged misconduct tended to interfere with employees' free choice, the Board applies an objective test. Sunrise Rehabilitation Hosp., 320 NLRB 212, 212, 1995 WL 791954, *2 (Dec. 19, 1995). Accord Torbitt & Castleman, Inc. v. NLRB, 123 F.3d 899 (6th Cir.1997). The subjective reactions of employees, like the subjective intent of the alleged wrongdoer, are not dispositive. NLRB v. Wis-Pak Foods, Inc., 125 F.3d 518 (7th Cir.1997); see also Torbitt, 123 F.3d at 907 (stating that an employee's subjective reaction does not render the

[29] See also L & A Juice Co, 323 NLRB 965 (1997) (employee's holding union meetings deemed inconclusive of agency status); Advance Products Corp., 304 NLRB 436 (1991) (employee who was member of in-house organizing committee, solicited support for union, distributed union literature, buttons, hats, and shirts, kept union informed of events occurring in plant, and served as election observer for union, not general agent of union); S. Lichtenberg & Co, 296 NLRB 1302, fn. 4 (1989) (no agency status existed where a group of self-designated individual employees became a "somewhat transitory, amorphous group," adjunct to a professional union staff that personally and actively directed the union's election campaign); Cambridge Wire Cloth Co., 256 NLRB 1135, 1139 (1981), enfd. 679 F.2d 885 (4th Cir. 1982) (card solicitation insufficient to show agency status); Tennessee Plastics, Inc., 215 NLRB 315, 319 (1974), enfd. 525 F.2d 670 (6th Cir. 1975) (union's most ardent employee advocate during organizational campaign found not to be a union agent, where she was not the union's principal contact with voters and where union was represented on the spot by a full staff of agents led by an international union organizer who personally directed the campaign).

challenged conduct unlawful). Rather, whether the alleged misconduct was reasonably likely to interfere with employees' free choice depends on objective facts, such as the timing of the allegedly improper act, the capacity of the actor, and similar prior acts. NLRB v. Dickinson Press, Inc. 153 F.3d 282, (6th Cir. 1998).

The record disclosed undisputed evidence that about one week before the election, employees Pineda and Carr engaged in a conversation about Carr's "Vote No" hat. However, there is a dispute as to what was actually said during that conversation. According to Carr, Pineda said that he (Carr) was sending mixed messages by wearing a "Vote No" hat, and that sending mixed messages in L.A. could be dangerous. Pineda, on the other hand, denied ever making such statements and instead testified that he heard Carr out, and told him that it was just a hat and not to worry about it.

I find it unnecessary to make a credibility determination in this matter. In my view, even if I credited Carr's testimony, the statement "sending mixed messages in L.A. could be dangerous," on its face, is vague and not a clear threat. Moreover, it is undisputed that this statement was not disseminated to other employees.[30]

In light of the above, I recommend that Employer's Objections No. 3 be overruled in its entirety.

[30] Based on the foregoing, even if Pineda was found to be an agent of the Union, and Carr's testimony was credited, this objection would still be insufficient to overturn the election.

Objection No. 5

> The Union and its predecessors have filed a series of Representation Cases in which they have attempted to represent the Employer's pressroom employees, but the employees historically have rejected the Union's attempts, in most cases by wide margins. During this campaign, Union agents on more than one occasion told bargaining unit employees that, "We know we are going to lose again, but you should vote for the Union just to make the results close and to send a message to the [Employer]." Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to exercise a free and reasoned choice in the election. As a result, a number of bargaining unit employees have expressed a strong desire that the Board hold another election that is free of such coercive, misleading statements and conduct as alleged herein, and in which all employees can vote their true preferences without such interference.

Employee Theresa Jimenez (herein "Jimenez") testified that she heard a few employees including, Berumen, Pineda, and employee Gerry Leavenworth state the following: "We know we are going to lose again, but you should vote for the Union just to make the results close and to send a message to the [Employer]."[31] Jimenez recalled that she heard Berumen make that statement several times, Leavenworth make that statement once, and Pineda make that statement twice. Jimenez testified that, although she did not make her final decision regarding how she was going to vote in the election until she was in the booth, at one point, the statement influenced how she intended to vote.

None of the parties took the opportunity to question Berumen or Pineda about whether they made that statement.

I requested that the Employer make an oral argument as to how it thought that statement interfered with, coerced, and/or restrained employees in the exercise of

[31] With regard to the other employees that allegedly also made this statement, Jimenez testified that she either could not recall their names, or she did not view them as Union agents.

their Section 7 rights, or otherwise interfered with employees' free choice in the election. In summary, the Employer argued that the purpose of the statement was to trick employees into voting for the Union, and that it ultimately deprived employees of their ability to make a reasoned decision during the election.

Analysis and Recommendation of Objection No. 5

The Board has long held that it will not probe into the truth or falsity of parties' campaign statements and that it will not set elections aside on the basis of misleading campaign statements. Midland National Life Insurance Co., 263 NLRB 127 (1982). In returning to the rule announced in Shopping Kart Food Market, Inc., 228 NLRB 1311 (1977), the Board reiterated its view that employees are "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." Midland National, at 132, citing Shopping Kart, at 1313. Moreover, misrepresentations of law are treated the same as other misrepresentations and the "mere fact that a party makes an untrue statement, whether of law or fact, is not grounds for setting aside an election." John W. Galbreath & Co., 288 NLRB 876, 877 (1988).

The record disclosed that on several occasions throughout the organizing campaign, employees, including Berumen, Pineda, and Leavenworth, stated, "We know we are going to lose again, but you should vote for the Union just to make the results close and to send a message to the [Employer]," either directly to, or in the presence of, Jimenez. Jimenez testified that at one point, the statement influenced her vote. The Employer argued on the record that the purpose of the statement was to

trick employees into voting for the Union and that it ultimately deprived employees of their ability to make a reasoned decision during the election.

While the Employer asserts in its oral argument that the statement contained in Objection No. 5 "tricked" employees into voting for the Union and deprived employees of their ability to make a reasoned decision during the election, I fail to find that this objection, read individually or cumulatively with the others, is sufficient to set aside the election. Rather, I find that the statement, assuming that it was even made, amounts to nothing more than a campaign statement, the truth or falsity of which is irrelevant in this matter, and which cannot be relied upon as a basis to set aside the election.

Accordingly, for the foregoing reasons, I recommend that Employer's Objections No. 5 be overruled in its entirety.

Conclusion

Having made the above findings and conclusions, viewing the alleged conduct individually and cumulatively, and upon the record as a whole, I recommend that Employer's Objections Nos. 1, 2, 3, and 5 be overruled in their entirety. Based upon my recommendation that Objections Nos. 1, 2, 3, and 5 be overruled, I further

recommend that the Petitioner should be certified as the collective-bargaining representative of the unit employees.[32]

DATED at Los Angeles, California, this 16th day of March, 2007.

Jessica A. Toton
Hearing Officer
NLRB, Region 21

[32] Under the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, exceptions to this report may be filed with the Board in Washington, D.C. 20570. Exceptions must be received by the Board in Washington by Friday, March 30, 2007. In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board wet site at www.nlrb.gov. On the home page on the website, select the E-Gov tab and on E-filing. Then select the NLRB office for which you wish to E-file your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.